Atlantic Structures Corporation *and* United Brotherhood of Carpenters and Joiners of America, Local 613. Case 5–CA–31460

February 8, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon a charge and first amended charge filed by the Union on September 10 and October 28, 2003, respectively, the General Counsel issued the complaint on November 19, 2003, against Atlantic Structures Corporation, the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the Act. The Respondent filed an answer.[1]

Thereafter, on July 15, 2004, the administrative law judge approved an informal Board settlement agreement that was signed by the Respondent, the Union, and the General Counsel. Among other things, the settlement required the Respondent to: (1) pay alleged discriminatee William Beyer $11,500, plus FICA contributions; (2) make whole, with interest, all unit employees for any losses they may have suffered as a result of the Respondent's failure to pay wage rates set forth in its collective-bargaining agreement with the Union; (3) make all fringe benefit fund contributions required by the collective-bargaining agreement, and make all unit employees whole for any expenses resulting from the Respondent's failure to make the pension and other fringe benefit contributions, with interest to the date of payment, as required by the collective-bargaining agreement and the accompanying fringe benefit participation agreements; and (4) escrow with the Board $25,000 to be used to make unit employees whole, with this amount due within 45 days of the signing of the settlement agreement.

In addition, the settlement agreement required the Respondent to allow the Union to conduct an audit of the Respondent's payroll records within 30 days of the signing of the agreement to determine, and issue a report on, wages and benefit fund contributions owed to unit employees pursuant to the collective-bargaining agreement and the accompanying fringe benefit participation agreements. The settlement provided that once the audit was complete and a determination had been made as to wages and benefits owed, the Union would issue a summary report of payments owed and to be disbursed out of the escrow fund. If the amount owed exceeded the escrow fund, the Respondent would be granted the right to make six equal monthly payments of the additional wages and benefits owed pursuant to the report. The settlement agreement provided, however, that payment of wages and benefits owed pursuant to the agreement would begin within 45 days of the signing of the agreement.

Further, the settlement agreement required the Respondent to post a notice to employees; to mail the notice to all unit employees employed between March 17 and September 1, 2003; to provide the Union and the Region with a list of the names and addresses of all employees to whom the notice was sent; and to provide the Region with the names and addresses of all former employees who were on the Respondent's payroll from March 1, 2003 through August 2003, in order that the Region could mail copies of the notice to them.

The agreement also contained the following provisions:

> COMPLIANCE WITH NOTICE—The Charged Party will comply with all the terms and provisions of said Notice. The Charged Party will notify the Region in writing upon completion of all affirmative obligations. In consideration of the Administrative Law Judge approving this Settlement Agreement, Respondent agrees that, in the event of any non-compliance to make required payments on the date specified, or to cure any such failure within fourteen (14) days of the specified payment date, the total amount cited in the Charging Party's audit report for wages and contributions owed to unit employees plus interest to date of payment shall become immediately due and payable. Respondent agrees after fourteen (14) days' notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, Respondent's Answer shall be considered withdrawn. Thereupon, the Board may issue an order requiring Respondent to show cause why said Motion of the General Counsel should not be granted. The Board may, without necessity of trial, find all allega-

[1] As set forth in the Motion for Summary Judgment, the hearing opened before Administrative Law Judge Earl E. Shamwell Jr. on March 10, 2004. The Respondent failed to produce all subpoenaed documents and the matter was continued until June 22, 2004. On June 15, 2004, counsel for the Respondent filed a motion to withdraw as counsel citing irreconcilable differences between counsel and the Respondent, including, but not limited to, failure to receive payment for services rendered. The judge granted the counsel's motion on June 18, 2004, and the hearing was postponed until July 20, 2004 to give the Respondent an opportunity to retain new counsel.

> tions of the Amended Complaint[2] to be true, and make findings of fact and conclusions of law consistent with those allegations adverse to respondent on all issues raised by the pleadings. The Board may then issue an Order providing full remedy as specified in the Amended Complaint. The parties further agree that a Board Order and U.S. Court of Appeals Judgment thereon may be entered ex parte. [Italics in original.]

By letter dated July 21, 2004, counsel for the General Counsel advised the Respondent that it was appropriate to proceed with compliance with the settlement agreement. By letter dated August 19, 2004, the compliance officer for Region 5 advised the Respondent that it had not complied with the terms of the settlement agreement, and stated that if the Respondent did not comply by September 1, 2004, the result may be a recommendation that the General Counsel file a Motion for Summary Judgment with the Board. To date, however, the Respondent has failed to comply with the settlement agreement in any manner.

On November 24, 2004, the General Counsel filed a Motion for Summary Judgment with the Board. On November 30, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the Motion are therefore undisputed.

Ruling on Motion for Summary Judgment

According to the uncontroverted allegations in the General Counsel's motion, although the Respondent filed an answer to the complaint, it subsequently entered into a settlement agreement, which provided for the withdrawal of the answer in the event of noncompliance with the settlement agreement. The Respondent has failed to comply with the terms of the settlement agreement by, among other things, failing to remit $11,500, plus FICA contributions, to William Beyer, with interest; make all contractually-required fringe benefit fund contributions and make all unit employees whole for any expenses resulting from its failure to make the required pension and other fringe benefit contributions, with interest to the date of payment; escrow with the Board $25,000 to be used to make unit employees whole; allow the Union to conduct an audit of the Respondent's payroll records to determine, and issue a report on, wages and benefit fund contributions owed to unit employees as required by the collective-bargaining agreement and the accompanying fringe benefit participation agreements; and mail a notice to all unit employees employed by the Respondent between March 17 and September 1, 2003, and provide the Union and the Region with a list of those employees, including their full names and addresses. We therefore find that the Respondent's answer has been withdrawn pursuant to the terms of the settlement agreement, and that as further provided in that agreement, all the allegations of the complaint are true.[3]

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Virginia corporation with an office and place of business in Virginia Beach, Virginia, has been engaged in the business of commercial, residential, and heavy construction.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its Virginia Beach facility and/or its various Virginia jobsites, goods valued in excess of $50,000 directly from points located outside the State of Virginia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that United Brotherhood of Carpenters and Joiners of America, Local 613, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Paul Sprinkle	—	Supervisor
David Tollaksen	—	CEO/President

In or around late June 2003, the Respondent, by Paul Sprinkle at its Grace Covenant Church jobsite, told employees the Respondent was tired of all the trouble with the Union and the hassle of using union carpenters.

On or about June 24, 2003, the Respondent, by David Tollaksen at the Respondent's Virginia Beach, Virginia office, told employees that union carpenters were too

[2] As noted in the General Counsel's motion, the reference to "amended complaint" in the settlement agreement is inadvertent, as there is no amended complaint in this proceeding, but only the complaint issued on November 19, 2003.

[3] See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

expensive, and the Company was going to replace union carpenters with Mexicans, because they are cheaper.

On or about August 6, 2003, the Respondent discharged its employee William Beyer because he formed, joined and/or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All full-time and regular part-time journeyman carpenters and pile drivers, carpenter foremen, general foremen, and apprentices employed by Respondent in the geographic area described in Article 2 of the parties' Memorandum of Understanding dated March 17, 2003.
>
> EXCLUDED: All office clerical employees, professional employees, employees engaged in non-carpentry related crafts, guards and supervisors as defined by the Act.

On or about March 17, 2003, the Respondent entered into a memorandum of understanding whereby it agreed to the terms and conditions of the collective-bargaining agreement between the Union and the Virginia Association of Contractors, Inc., effective March 17, 2003.

The Respondent, an employer engaged in the building and construction industry, as described above, granted recognition to the Union as the limited exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition is embodied in a collective-bargaining agreement, the most recent of which is effective until April 30, 2007.

Since on or about March 17, 2003, the Respondent has refused to adhere to the collective-bargaining agreement, by failing to continue in effect all the terms and conditions of the agreement, such as wages and other benefits.

The terms and conditions of employment described above are mandatory subjects for the purposes of collective bargaining. The Respondent's refusal to adhere to the collective-bargaining agreement was without the Union's consent.

In or around late June 2003, the Respondent, by Paul Sprinkle at the Respondent's Grace Covenant Church jobsite, bypassed the Union and dealt directly with unit employees by offering employees the same rate of pay as required by the March 17, 2003 memorandum of understanding, plus the Respondent's health benefit plan.

In or around mid-July 2003, the Respondent, by Paul Sprinkle at the Respondent's Lynnehaven Mall jobsite, bypassed the Union and dealt directly with unit employees by negotiating wage rates for the position of foreman.

CONCLUSIONS OF LAW

1. By the statements set forth above made to employees by Paul Sprinkle and David Tollaksen in June 2003, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By discharging William Beyer because he formed, joined and/or assisted the Union and engaged in concerted activities, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

3. By refusing to adhere to the terms and conditions of its collective-bargaining agreement with the Union and by bypassing the Union and dealing directly with unit employees regarding terms and conditions of employment, the Respondent has failed and refused to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging William Beyer, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. We also shall order the Respondent to make Beyer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files all references to the unlawful discharge of Beyer, and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) since about March 17, 2003, by refusing to continue in effect all the terms and conditions of the collective-bargaining agreement, we shall order the Respondent to honor the terms and conditions of the collective-bargaining agreement, and to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's refusal to adhere to the collective-bargaining agreement.

In order to remedy the Respondent's failure to make contractually-required fringe benefit payments, the Respondent shall be required to make all contractually-required benefit payments that have not been made since about March 17, 2003, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Atlantic Structures Corporation, Virginia Beach, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it is tired of all the trouble with the United Brotherhood of Carpenters and Joiners of America, Local 613 and the hassle of using union carpenters, and that union carpenters were too expensive and that the Respondent was going to replace union carpenters with workers who cost less.

(b) Discharging employees because they form, join and/or assist a union, and engage in concerted activities.

(c) Failing and refusing to adhere to the terms and conditions of its collective-bargaining agreement with United Brotherhood of Carpenters and Joiners of America, Local 613, covering the employees in the following unit:

> INCLUDED: All full-time and regular part-time journeyman carpenters and pile drivers, carpenter foremen, general foremen, and apprentices employed by Respondent in the geographic area described in Article 2 of the parties' Memorandum of Understanding dated March 17, 2003.
>
> EXCLUDED: All office clerical employees, professional employees, employees engaged in non-carpentry related crafts, guards and supervisors as defined by the Act.

(d) Bypassing the Union and dealing directly with unit employees regarding terms and conditions of employment.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Beyer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make William Beyer whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files all references to the unlawful discharge of William Beyer, and within 3 days thereafter, notify Beyer in writing that this has been done and that the unlawful discharge will not be used against him in any way.

(d) Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of its unlawful failure, since about March 17, 2003, to continue in effect all the terms and conditions of the collective-bargaining agreement, with interest, as set forth in the remedy section of this decision.

(e) Make all fund payments required by the collective-bargaining agreement that have not been made since about March 17, 2003, and reimburse unit employees for any expenses ensuing from its failure to make the required payments, in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Virginia Beach, Virginia, copies of the at-

tached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 17, 2003.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 8, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that we are tired of all the trouble with the United Brotherhood of Carpenters and Joiners of America, Local 613 and the hassle of using union carpenters, and that union carpenters were too expensive and that we would replace them with workers who cost us less.

WE WILL NOT discharge employees because they form, join and/or assist a union, and engage in concerted activities.

WE WILL NOT fail and refuse to adhere to the terms and conditions of our collective-bargaining agreement with United Brotherhood of Carpenters and Joiners of America, Local 613, covering the employees in the following unit:

INCLUDED: All full-time and regular part-time journeyman carpenters and pile drivers, carpenter foremen, general foremen, and apprentices employed by us in the geographic area described in Article 2 of our Memorandum of Understanding with the Union dated March 17, 2003.

EXCLUDED: All office clerical employees, professional employees, employees engaged in non-carpentry related crafts, guards and supervisors as defined by the Act.

WE WILL NOT bypass the Union and deal directly with unit employees regarding terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Beyer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make William Beyer whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge of William Beyer, and, WE WILL, within 3 days thereafter, notify Beyer in writing that this has been done and that the unlawful discharge will not be used against him in any way.

WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our unlawful failure, since about March 17,

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2003, to continue in effect all the terms and conditions of the collective-bargaining agreement, with interest.

WE WILL make all fund payments required by the collective-bargaining agreement that have not been made since about March 17, 2003, and reimburse unit employees for any expenses ensuing from our failure to make the required payments.

ATLANTIC STRUCTURES CORPORATION